Rebuttle of Mervyn E Bennun

It is clear that the correct legal duty of South Africa was to desist from arresting a sitting Head of State. And it is noteworthy to stress – this duty lies in the competence of the executive, not the judiciary.

By Alexander Mezyaev

The article by Mervyn Bennun attempts to prove that the current government of South Africa is responsible for the violation of the Constitution, its international legal commitments and for defying a court order. But the faulty legal propositions underlying his argument must be analysed.

The main arguments of the Author may be summarised as follows:

- Firstly, the African Union Convention and Diplomatic Immunities and Privileges Act that established the immunity of the Heads of State have not been enacted as a part of South African Law, and therefore are *not binding* in South Africa.
- Secondly, the Rome Statute and South Africa's Implementation Act totally changed the pre-existing law governing the immunity of Heads of State.

Both arguments are defective. Let us analyse them in more detail.

The claim that the AU Convention has not been enacted to be a part of South African law and is therefore not binding in SA

Claiming that the AU Convention Diplomatic Immunities and Priviledges Act (DIPA) is valueless in defending the position of the government in the present case, Bennun states that this Act makes no reference to the ICC Statute. Why so? Bennun thinks that it is so because the only immunity DIPA conferred "is in relation to South African courts".

To use such an argument to attack the position of the government is really strange, because this argument is 100% in favour of the government. The core of the present case is not the ICC, but the local state court. The government is under fire for not implementing the local court decision. And Bennun just

explained why it is fine – because foreign Heads of State have immunity *in South African courts*.

Do – according to DIPA – foreign Heads of State have immunity in relation to South African courts? The answer is a definite yes. This answer is yes in each and every case these local courts are intended to resolve. Simply this kind of court has no jurisdiction to try Heads of State. Later we will explain a bit more about how the matter of jurisdiction was just "forgotten".

The Author (Bennun) does not understand the confusion of subject-to-subject matter of the case. This case is not between the South African government and the ICC, but between the South African government and a South African court. Thus the norms on immunity of Heads of State before local courts are applicable, not the norms of the ICC Statute!

Analysing this argument of the Author further, it is interesting to notice an attempt to substitute the object of some international treaties on immunities and diplomatic law by playing with the definition of 'diplomat'. The Author always stresses that the Vienna Convention on Diplomatic Relations and DIPA grant immunities to 'accredited' diplomats, giving the impression that diplomatic missions are confined only to embassies with their staff. In another place the Author writes directly that "Al-Bashir was not in South Africa as an accredited diplomat in the Sudanese mission but as Head of State for the purposes of the AU Convention which, unlike the Rome Statute, has not been enacted to be a part of South African law. He thus enjoyed no immunity as a diplomat, and even as a Head of State any immunity he might otherwise have enjoyed had been nullified by Article 27 of the Rome Statute…".

The claim that Omar Al-Bashir was not in South Africa as an accredited diplomat is quite an odd argument and may be a misrepresentation of international law. Diplomatic immunity covers other members of all kinds of diplomatic missions. The Vienna Convention of Diplomatic Relations enumerates these missions, which include temporary missions like governmental delegations etc.

The argument that the AU Convention and DIPA were not enacted as South African laws and thus are not binding is not sustainable. Yes, article 231.4 of the South African Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation. But it does not mean that any non-domesticated international agreements are non-binding! The second part of the same article states that a self-executing provision of an agreement that has been approved by Parliament (i.e. ratified) is law in the Republic. A non-domesticated international treaty may contain perfectly self-executed provisions and thus be binding to the state-party. The Author is just confusing two matters – the binding nature of the source of a law as a whole and nature of the norms contained in the source as well as the mode of the implementation of such norms.

> "The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."

The weakness of this argument is also based on the lack of taking the law as a system. South African law consists not only of the ICC Statute Implementation Act. It also consists of other treaties and norms of customary international law. The Author demonstrates total disregard of customary international law, claiming that it was completely changed. This is quite strange, because the main point of the Author in claiming that the SA government violated the Constitution and it is exactly the SA Constitution that established the following regime of customary international law:

- the customary law is law in the Republic of South Africa,[1] and
- the interpretation of law must be conducted in a good faith.

Taking all law (and not only selective part of it) into consideration is a clear part of such a good faith approach.

South Africa is not a signatory to the Vienna Convention on the Law of Treaties (VCLT), which was concluded in 1969 and entered into force in 1980. But VCLT is regarded as declaratory of customary international law and binds all states regardless of whether they are a party to it or not. South Africa is not a party to the Vienna Convention on the Law of Treaties, but, as explained by the Chief State Law Advisor (IL), is bound to the provisions of the Convention.[2]

Thus, interpreting the legal force of the AU Convention it is important to refer to the most fundamental rules of treaty status from the Vienna Convention of 1969. Article 18 of VCLT ("Obligation not to defeat the object and purpose of a treaty prior to its entry into force") says that a State is *obliged* to refrain from acts which would defeat the object and purpose of a treaty even before the ratification (i.e. formal entry of the treaty into force) of the treaty.

It is clear that international treaty and customary law proclaim a special regime for the object and purpose of the treaties even those which are not ratified or entered into force. What is the purpose of AU Convention, DIPA and some other treaties, claimed to be non-domesticated? The purpose is to establish the regime for the diplomatic missions (not only for accredited diplomats as the Author claims) that assure the safe implementation of their tasks. The immunity of Heads of State is a necessary part of such a regime. So the claim that non-domestication of the DIPA or any other treaty makes them non-binding is wrong.

The Claim that the Rome Statute and South Africa's ICC Implementation Act totally changed the pre-existing international law governing the

immunity of heads of state

This claim is repeated so many times in so many different sources that it becomes a kind of an axiom that does not need to be proved. The only "proof" of this claim is an article 27 of the ICC Statute (repeated verbatim in Implementation Act). But let us read this text more attentively:

Article 27 Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The Author states that article 27 "denies immunity to heads of state from the jurisdiction of the ICC". But then he applies this conclusion to South African courts and not to ICC!

The very first sentence of the para 1 of the Article 27 shows that it is applicable to the ICC and individuals before the ICC. It clearly shows that it regulates the relations between individuals (be they heads of states or of governments) and the ICC only. There is nothing in this article that may impose any obligations to any other subject than these two. It must be said very clearly: this article may not be used as justification for the "abolition" of the immunity of the heads of states. At most it may be interpreted as a prohibition to the accused not to use a reference to his or her official capacity (as a special defence in criminal proceedings.

Article 31 of VCLT (General rule of interpretation) names as the first rule the rule of good faith: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

All attempts to 'interpret' a clear norm should be considered as made not in a good faith. Moreover when the norm is clear no interpretation is allowed. The correct establishment of the subject-to-subject matter shows that the article 27 of ICC Statute is really clear. It establishes relations between the accused and the ICC. To 'extend' this article to relations between ICC and states is simply a manipulation and violation of interpretation in good faith.

It is a pity that the Author spent so much space on a totally wrong proposition, but never proved his main argument. It is interesting to note that this mistake was made by the Author again by the wrong take in subject-to-subject matter. We are fully aware that this negation of the customary international law immunity is not an exclusive argument of the Author. In fact he took it from the North Gauteng High Court (NGHC) Judgment issued on 24 June 2015. In para 28.8 of this Judgment the court says that the ICC Statute "expressly provides that heads of states do not enjoy immunity under its terms" and that "similar provisions are expressly included" in the IRSA. The court then drew an extraordinary conclusion:

> *It means that the immunity that might otherwise have attached to president Bashir on customary international law as head of state, is excluded or waived in respect of crimes and obligations under the Rome Statute.*

The conclusion totally lacks basis in any citation, explanation or interpretation. It simply states – "it means…" – and constructs a formula that suits the court. This 'forgetfulness' leaves the court's decision with no legal force because it is not explaining how the ICC-to-accused norm was extended to ICC-to-states relations! It is absolutely clear that the North Gauteng High Court made a mistake claiming that ICC Statute and IRSA exclude or waive the immunity of heads of state and it changed the customary international law norm on immunity.

> "It seems that is not the law that brings the Author to the idea of charging the government. It is idea of charging the government that brings him to his selection of the law and arguments to be cited or ignored."

We just analysed the two main arguments of the Author. Most of his article is based on these two defective arguments. We have already shown how often the Author confuses the subject-to-subject matters in analysing law. His uncritical reliance on the NGHC judgment is also wrong. If he had taken a critical approach to this Judgement he would have noticed at least one other confusion made by the court. And the court's confusion is really amazing where it confuses jurisdiction and immunity! It assumed that the existence of jurisdiction (though established very unconvincingly) could just be equated with the absence of immunity! The International Court of Justice reminds us: "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction".[3]

Bennun is very selective in choosing which of the government's arguments to battle with and which to ignore. He goes much further than the court and claims that government officials must be charged with treason. This selectivity does not sit well. In fact the article is based not on the analysis of the legal arguments of the government but on battling with words spoken by several government officials, made outside the court. The Author consistently avoids the legal arguments the government presented in court.

He avoids even some arguments that with due and genuine consideration might disprove his idea of bringing the government to trial. For example, he ignores the impracticability of the NGHC decision. Article 165 of the

Constitution states that "An order or decision issued by a court binds all persons to whom and organs of state to which it applies". But this article is critically important in his analysis, because later he asks the questions: "Why should those who have sworn thus not be charged with treason? At the very least, why should those responsible, as Zulu has revealed, not be charged with contempt of court?" It is clear that if the Author honestly considered the argument of impracticability he could not have come up with these notions of treason or even contempt. So it seems that is not the law that brings the Author to the idea of charging the government. It is idea of charging the government that brings him to his selection of the law and arguments to be cited or ignored.

By the way the argument of the impracticability of the NGHC decision is a very interesting one. It is most probable that this argument meant that president Al-Bashir was already out of the country when the court ruling was made. But there is another sense in this argument too. One does not require a very rich imagination to predict that the arrest of a head of state could lead to a declaration of war. The impracticability of a decision that might cause a war is a serious argument that could not be easily ignored.

Let us, unlike Bennun, consider the government's arguments; they are public. It was impracticable to execute the court's decision, because the court ordered something that violated South African international legal obligations. Moreover, the court decision contains a lot of legal defects. Here some of them:

- The court acted contrary to established international law as was stated by the International Court of Justice in its Judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium): "it is firmly established that ... certain holders of high-ranking office in a State, such as the head of State ... , enjoy immunities from jurisdiction in other States, both civil and criminal". Thus NGHC clearly erred in law stating that President of Sudan "does not enjoy immunity in accordance with the rules of customary international law".
- Article 32 of the Vienna Convention on Diplomatic Relations (1961) provides that only the sending State may waive such immunity", and this "reflects customary international law". The domestic legislation giving effect to this Convention requires that any such waiver always be explicit and in writing. No such waiver exists in the given case.
- There exists under customary international law no form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent high state officials, where they are suspected of having committed war crimes or crimes against humanity. The NGHC again erred in construing an exception in the case of "international human rights law".
- The NGHC misconstrued Articles 86 and 89 of the Rome Statute. Both provisions are internally qualified. Article 86 is subject to other provisions of the Statute, and article 89 is subject to Part 9 of the Statute. Thus both provisions are expressly subject to article 98(1) of the Statute. The effect of article 98(1) is that a request by the ICC which would require South Africa to act inconsistently with the immunity of Sudan's President may not be made by the ICC unless the ICC can first obtain the cooperation of Sudan for the waiver of the immunity. Thus not only is it Sudan (not the Security Council) which must waive the immunity. The immunity is also expressly extant - otherwise there could be nothing to waive.[4]

To summarise, it is clear that the correct legal duty of South Africa was to desist from arresting a sitting Head of State. And it is noteworthy to stress – this duty lies in the competence of the executive, not the judiciary. Neither the ICC Statute nor the Implementation Act requires member States to violate the sovereign immunity of third party States' heads of state. But the North Gauteng High Court not only held that they do, but also imposed such legal duty on the Government. It did so by declaring in the first order that Government's failure to take steps to "arrest and/or detain" President of Sudan was inconsistent with the Constitution of South Africa".

The claim that the Government violated the Constitution

Aiming to prove that the South African government violated the Constitution, Bennun feels safe to make such a claim based on the court's decision. The NGHC in its Judgment of 24 June 2015 indeed stated that the conduct of the governmental officials "is inconsistent with the Constitution". This is another statement that was made with no convincing proof.

In fact this statement was made the first time in the same court's decision of 15 June and was left without any explanation at all. The count promised to issue the written reasoning 'next week'. In fact it was issued later, but the Judgment of 24 June still contains no reasoning proving the violation of the Constitution. First of all, it was not said what exact article of the Constitution was violated by the government. Secondly, there was no legal reasoning leading to this conclusion. The only attempt to do this was reference (without citation) of the articles 1 and 2 (where it is declared that the State is founded on the supremacy of the Constitution and the rule of law), reference (without citation) to article 231 (where it says that international agreements bind the Republic) and full citation of the article 165 that enumerates the power of the judiciary. All this fills a little bit more than half of a page. Needless to say, this in no way proves that the government violated the Constitution.

The Author's critique is that the government supposedly missed the point: "Their [government] response is significant: little effort has been made to criticise the High Court's decisions in the terms in which they were made – that is, confined to the law which the Court was restricted to". But whether the Author himself is correct in the object of his analysis? On one hand the Author refers to the High Court *decisions*, but in the very analysis he confined himself only to *one decision*. Is this accidental, or are there are more serious reasons for such a self-limitation?

Talking about the Al-Bashir case we are indeed facing several decisions of the NGHC, namely: Decision of 14 June 2015 ordering the SA authorities to stop Al-Bashir from leaving the country, Decision of 15 June 2015 claiming that the SA government violated the Constitution, and Decision of 25 June 2015 explaining why it had decided that the SA government violated the Constitution.[5]

Bennun refers only to the third decision, consistently avoiding the second one and acting as if there was no first one. This looks illogical. It is not logical to analyse the decision proclaiming the government as a violator of law without having a look at the very decision the accused is supposedly violating. But having a look at the first decision made this illogicality understandable.

Let us have a look at this first decision of 14 June 2015, signed "by the court" by "the Registrar" (without giving his or her name). It states that the respondents are compelled to prevent President Omar Al Bashir from leaving the country "until an order is made in this Court". A draft order is attached to the same decision (an interim order is granted as follows):

1. President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so.
2. The eighth respondent, the Director General of Home Affairs is ordered:
   - to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic, and
   - once he has done so, to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit.[6]

What is the most amazing part of this decision? In it is a lack of legal reasoning. The decision was made "having heard counsel for the parties and having read the documents filed of record." No matter of jurisdiction was resolved. No legal authority was cited. No single reference to the law was made.

Notwithstanding such 'forgetfulness' there are very serious questions of law that must be resolved before the court may be bold enough to prevent the head of a foreign state from returning to his home and, even more so, to oblige the government to prevent this head of state from leaving the country.

It is very clear that in issuing such an order the court needed to resolve these matters; and as we see, that was not done, good or bad. There was not even an attempt to resolve these matters. And it is clear why. Because there is no law that gives the court jurisdiction to judge a head of state. Then the question arises: is there an obligation on the government to implement an order that was made contrary to law and without legal reasoning?

The Al-Bashir case brought up a lot of interesting questions concerning national and international law. Some of them still have to be discussed and analysed. We do not think that these matters can be deeply analysed in the framework of a short article, so we only list them with a short commentary.

> "Thus not only is it Sudan (not the Security Council) which must waive the immunity. The immunity is also expressly extant - otherwise there could be nothing to waive."

One of these is a question of foreign policy in the context of the separation of powers in South Africa. The implementation of the relations between South Africa and the ICC, including dealing with arrest warrants, is a prerogative of the executive. IRSA clearly names these governmental organs: Central Authority (meaning the Director-General, Justice and Constitutional Development) and National Director (meaning the National Director of Public Prosecutions). The role of the High Courts is limited to the implementation of the process that was started by the executive. For example, article 5.4 of IRSA states that the Cabinet member responsible for the administration of justice must … designate an appropriate High Court in which to conduct a prosecution against any person accused of having committed a crime. In all other instances the courts are mentioned only in relation of the process that was started by the government. There is nothing in the IRSA to claim that the South African courts may direct the government to implement ICC arrest warrants. Moreover there are quite clear indications that such a claim directly contradicts certain norms of IRSA. For example article 8.1 (Endorsement of warrants of arrest) says that *any request received from the Court for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Court must be referred to the Central Authority and accompanied by such documents as may be necessary to satisfy a competent court in the Republic that there are sufficient grounds for the surrender of that person to the Court*. There are at least two main conclusions that may be drawn from this text.

First – the execution of the arrest warrant is not a matter for the courts; it is a matter for the executive. Second – there is no automatic execution of arrest warrants. Before sending for the execution the Central Authority must verify that the received warrant is accompanied with very precise documents. Let us imagine that the Central Authority have not received the abovementioned documents. Or these documents were received but they do not satisfy a competent court that there are sufficient grounds for the surrender of the person. These conditions must be verified.

There is no way to claim that execution of the arrest warrant is something automatic, as all protagonists of the ICC are claiming. However, these protagonists claim it so repeatedly and so aggressively, that they indeed succeed in making us believe that South Africa must arrest at the first wish of the ICC! But the general and probably the main conclusion from the IRSA is that the relations between ICC and the Republic

of South Africa is a competence of the executive.[7] According to the IRSA the judiciary has no power to interfere with ICC-government relations. We must expect serious consideration of the matter of interference in the executive competence.

Another matter that definitely must be addressed is a problem *victims v. people*. The Author wonders: "how turning away from the ICC will be explained to the genocide victims in Sudan". First of all it is quite strange why a lawyer claiming the sanctity of the rule of law throughout the whole text, totally disregards one of the fundamental element of this rule, namely the presumption of innocence? Why does he call Sudan's President "genocidaire"? Now even non-lawyers know about presumption of innocence. There is no court's decision proving the guilt of Al-Bashir in committing genocide. Second, the Author is concerned with what to say to victims of the crimes in Sudan, but seems to be totally not interested what will be the explanation to the population of the Republic of Sudan, who just elected Omar Al-Bashir as their Head of State.[8] The same non-interest is demonstrated in relation to the explanation to the people of South Africa that may be plunged into war, if the government implemented the NGHC decision.

The possible withdrawal of South Africa from the ICC

We would like to finish the analysis of the Author's article on his emotional rhetoric on the withdrawal of the Republic of South Africa from the ICC, when he calls the review of South African cooperation with the ICC as 'embarrassing'. Trying to placate the critics of the ICC, the Author says that 'commentators have justly pointed to anomalies and problems in the work of the ICC' but that 'this is not the paper to explore in depth the ugly inheritance of colonialism and the attempt by former colonial Powers to abuse the ICC for their own ends'. These definitions are misleading. The position that the ICC 'is not perfect' is a sly one.

The wily nature of the position that the ICC is just 'not perfect' is that all the problems with the ICC work are not anomalies, they are rules. What is really embarrassing is the manipulation with made-up urgency when the ICC decision that South Africa must arrest Al-Bashir was made by one judge instead of the full bench. What is really embarrassing is that the ICC judge refused to meet with the Chief Legal Advisor of South Africa who had gone to the Court. What is really embarrassing is that the ICC is delivering decisions with no legal reasoning or when these decisions are reasoned but contrary to international law.[9]

The review of relations with the ICC is a legitimate and reasoned decision. The time for illusion is over for many states. It is now clear: more and more states are starting to realise that the ICC is not an international institution. That means the International Criminal Court is not acting in the name and in the interest of the member-states. It acts in the name and in the interest of global powers with their own agenda. Thus all primitive arguments like "we shall stay in the ICC and influence it from inside" are just naïve.

It is difficult not to see the process of radical changes that modern international law is experiencing. First of all – there are continuous and aggressive attempts to destroy the very substance of international law as law of common benefit, created by all members of the international community by their free will.

One of the most important appendices to the current negotiations on the treaty called 'Transatlantic Trade and Investment Partnership' – Trade in Services Agreement – is an attempt to create a new trade regulation system outside the WTO. This is a clear attempt to create the club of privileged states acting to the detriment of the majority of states. The BRICS states were not invited or even informed about the very fact of these negotiations. The agreement was prepared in secrecy until last year. Even in 2015 we were merely informed about the fact that this treaty is in preparation, but the content is confidential. If it will be signed it will remain confidential for five years. On the European side the negotiations were conducted by the European Commission in its own name, without consultations with EU member-states.

The destruction of Ukraine as a state was as a result of an open threat to the country to sign the treaty of 'association' with European Union. The Government of President V. Yanukovych who postponed (only postponed, not refused!) the signing, was overthrown.

The destruction of international law is not going on as a side effect. It is being implemented as a policy, thus there were special institutions established. The International Criminal Court is one of these institutions. One of the aims of the ICC is to destroy current progressive international law and to create new – regressive and then repressive – international law. One of the features of the laws being created is the abolition of the fundamental norms of international order, including the immunity of heads of state. The Al-Bashir case is not a case about a man called Omar Hassan Ahmad Al-Bashir. Immunity is not a personal thing, it is an integral part of the sovereignty of independent states.

So South Africa was being forced to take part in a violent attack on the sovereignty of a foreign state, putting the peoples at risk of war. In this context the Author's question – "Why is this not a quiet *coup d'état*?" – might be very useful for deeper reflection. Though it might lead us in a different direction from that which Bennun seeks. ■

References:

1. Article 232 of the Constitution says: "Customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament.
2. http://www.dfa.gov.za/chiefstatelawadvicer/general.html
3. International Court of Justice. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). Judgment of 14 February 2002. Para 59.
4. More detailed arguments of South African government see: Supreme Court of Appeal. Notice of Motion. 30 September 2015 // http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Bashir-state-SCA-FA.pdf
5. There are some other decisions, like the Judgment of 16 September 2015 on the application for leave to appeal and may be another decisions in other courts, taking into account the ongoing hearings in the Supreme Court of Appeal. Here we are enumerating only those decisions that were issued in June 2015 and critically important in the context of the point of «forgetting» of the very first decision of the court.
6. http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf
7. There are many other examples of this in IRSA. Article 5.1 – «Institution of prosecutions in South African courts» provides that no prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director.
8. In April 2015 President Al-Bashir got 94% of votes in the general election.
9. For further detailse see Mezyaev *The Thinker* Vol 67